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U.S. DISTRICT COURT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 19 2009

THOMAS K. KAHN
CLERK

EDDIE HAYNES,
Plaintiff/Appellee,

vs.

CITY OF MONTGOMERY, ALABAMA
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

06-01093-CV-WKW-WC

**RESPONSE OF APPELLANT CITY OF MONTGOMERY
TO APPLICATION FOR ATTORNEY'S FEES AND
EXPENSES OF APPELLEE EDDIE J. HAYNES**

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City of Montgomery, Alabama

No.08-16533-DD

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CASE NO. 08-16533-DD
EDDIE J. HAYNES V. CITY OF MONTGOMERY

**RESPONSE OF APPELLANT CITY OF MONTGOMERY
TO APPLICATION FOR ATTORNEY'S FEES AND
EXPENSES OF APPELLEE EDDIE J. HAYNES**

Appellant City of Montgomery ("City") pursuant to 11th Cir. R. 39-2(c), Federal Rules of Appellate Procedure, submits the following response to the Application for Attorney's Fees and Expenses of Appellee Eddie J. Haynes ("Haynes").

On August 27, 2009 this Court issued a four page non-published opinion affirming the judgment entered for Haynes on October 28, 2008 by the trial court. The City's Petition for Rehearing was denied on October 2, 2009. On October 9, 2009, Haynes filed an Application for Attorney's Fees and Expenses pursuant to 11th Cir. R. 39-2(a), Federal Rules of Appellate Procedure. On October 9, 2009, Haynes also filed a Motion to Transfer Consideration of Attorney's Fees and Expenses to the District Court pursuant to 11th Cir. R. 39-2(d), Federal Rules of Appellate Procedure.

City does not dispute that 42 U.S.C. § 12205 of the Americans with Disabilities Act ("ADA") authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee,

including litigation expenses, and costs”; however City contends that the hourly rate is unreasonable and the billing records include hours that are “excessive, redundant, or otherwise unnecessary..” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

The fee applicant bears the burden of “establishing entitlement and documenting the appropriate hours and hourly rates.” Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988). This burden includes supplying the court with specific and detailed evidence from which it can determine the reasonable hourly rate, maintaining records to show the time spent on the different claims, and setting out with sufficient particularity the general subject matter of the time expenditures so that the district court can assess the time claimed for each activity. ACLU of GA v. Barnes, 168 F.3d 423, 427 (11th Cir. 1999). A fee applicant should also exercise “‘billing judgment,’” Id. at 428 (quoting Hensley at 434). That is, the applicant should “exclude from his fee applications ‘excessive, redundant, or otherwise unnecessary [hours],’ which are hours ‘that would be unreasonable to bill to a client and therefore to one’s adversary irrespective of the skill, reputation, or experience of counsel.’” Id. (quoting Norman, 836 F.2d at 1301) (citation omitted).

The amount requested by appellee for attorney's fees and expenses should be reduced significantly because the hourly rates and total billable hours are excessive, redundant, or otherwise unnecessary.

I. Increase in Requested Hourly Rate

The Application for Attorney's Fees and Expenses of Appellee Eddie Haynes ("Haynes") filed on October 9, 2009 with this Court requests compensation at a rate of \$275 per hour for Miller and a rate of \$225 per hour for Brashier. To support the Application for Attorney's Fees and Expenses, counsel for Haynes submits affidavits prepared by Attorney Gerald L. Miller ("Miller") and Attorney Keith E. Brashier ("Brashier"), M. Wayne Sable and Jimmy Jacobs. (*Exhibits D, E, F & G*). All of the affidavits indicate that \$275 per hour is a reasonable rate for Miller. (*Exhibits D, E, F & G*). Additionally, all affidavits except that of M. Wayne Sable submit that \$225 per hour is a reasonable rate for Brashier. (*Exhibits D, E & G*).

Previously, Miller, Brashier, Sable and Jacobs submitted very similar affidavits to the trial court stating that \$250 was a reasonable rate for compensation for Miller and \$175 was a reasonable rate for Brashier. (*Docs. 71-3; 71-4; 71-5; 71-6*). The Memorandum Opinion and Order entered by the trial court on October 6, 2008, ordered that City pay attorney

fees at the rate of \$250 for Miller for attorney fees for their representation through briefing in response to City's post-trial motions in May 2008. (*Doc. 90, pp. 25-26*).

The first billing entry in the application before this Court is for June 11, 2008. Therefore, Miller is requesting a \$25 increase from \$250 per hour to \$275 per hour and Brashier is requesting a \$50 increase in compensation from \$175 for services performed in representation of Haynes before the trial court beginning in June 2008 after being awarded hourly fees of \$250 and \$175 through the month of May.

There were no new issues or grounds raised in the appeal of this matter that were not addressed by counsel in post trial motions. Counsel has offered no reason for this Court to depart from the previously ordered hourly rates \$250 and \$175 which were submitted as reasonable by the parties.

The Court should reduce the hourly rates requested in the application for attorney rates on appeal to at least at hourly rate of \$250 for Miller and \$175 for Brashier as ordered by the trial court. Miller and Brashier have attested that the rates ordered by the trial court were reasonable. Although this Court has held counsel for a prevailing party is entitled to reasonable attorney's fees, the fee award should not produce windfalls to attorneys. *See Dowdell v. Apopka*, 698 F.2d 1181, 1189-90 (11th Cir. 1983).

II. Time Billed through Post-trial Motions vs. Time Billed for Appeal

The Memorandum Opinion and Order ordered that City pay Miller for 357.30 hours and Brashier for 74.4 hours which totaled 431.70 hours and included compensation for attorney fees initial representation through Haynes' briefing in response to City's post-trial motions in May 2008. (*Doc. 90, pp. 25-26*). Miller's compensation was for services from May 2005 through May 2008. (*Docs. 71-2; 71-3; 83; Exhibit D, ¶ 2*). Brashier's compensation was for services from February 2008 through May 2008. (*Docs. 71-2; 71-4; 83; Exhibit E, ¶ 2*). The total amount ordered by the trial court for attorney fees through May 2008 was \$102,345.00. (*Doc. 98, ¶ 2*).

The application for attorney's fees requests compensation for a total of 227.50 hours for Miller and Brashier in the appeal of this matter for a total amount of \$62,122.50 in attorney fees. The amount requested in the application currently before the Court requests compensation of over half of the amount that was previously billed for time spent representing Haynes from May 2005 through May 2008 which included discovery, responses to dispositive motions, trial and responses to post-trial motions. There were no new issues or grounds raised in the appeal of this matter that were not raised at trial or addressed in post trial motions.

Miller generally claimed 43.5 hours in preparation for oral argument; however, does not specify with sufficient particularity what the preparation entailed for court to assess whether the time is excessive or unnecessary. Miller has requested compensation for 28.7 hours of legal research and Brashier compensation for 3.5 hours. While many of the "research entries" identify with specificity the issues being researched, others cite research case law or just research and research entries from October 2008 and February 12 through February 14 appear to be duplicative. Counsel should specify the issues being researched with sufficient particularity for court to assess whether the time is excessive, redundant or unnecessary.

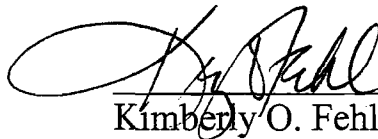
The issues raised on appeal are the same as those raised in post-trial motions. Miller attests that he has practiced in the area of employment discrimination for at least 25 years. (*Exhibit D*, ¶ 1). Although fee counsel has provided supporting documents that the hours spent were reasonable and necessary, the Court should review the application and consider whether the hours were obviously excessive.

The Court in ACLU of GA v. Barnes, 168 F.3d 423, 431 (11th Cir. 1999) citing Norman stated: "[f]or decades the law in this circuit has been that '[t]he court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable

and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.' " Norman, 836 F.2d at 1303. Accordingly, "where the time or fees claimed seem expanded or there is a lack of documentation or testimonial support the [appellate] court may make the award on its own experience." Id.

For the foregoing reasons, City respectfully request this Court to reduce the award of attorney's fees and expenses to a reasonable hourly rate and reasonable billable hours.

Respectfully submitted this 16th day of October, 2009.



Kimberly O. Fehl

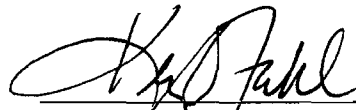
CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been furnished to the following, properly addressed, and postage prepaid, on this the 16th day of October 2009:

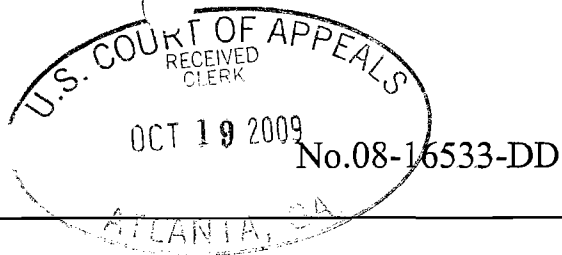
**Thomas K. Kahn, Clerk
Eleventh Circuit United States Court of Appeals
56 Forsyth Street, N.W.
Atlanta, GA 3030-2289**

I further certify that on the 16th day of October 2009, a copy of the foregoing was served upon the following parties by placing a copy of it in the United States Mail, postage prepaid and addressed as follows:

Gerald L. Miller
Keith E. Brashier
Redden, Mills & Clark, LLP
940 Financial Center
505 North 20th Street
Birmingham, Alabama 35203

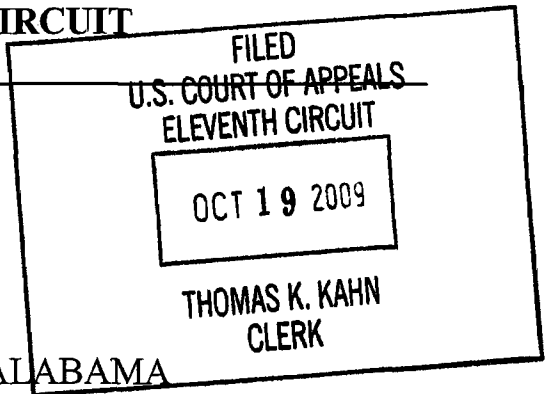


Kimberly O. Fehrl



**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

EDDIE HAYNES,
Plaintiff/Appellee,
vs.
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Defendant/Appellant.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

06-01093-CV-WKW-WC

**RESPONSE OF APPELLANT CITY OF MONTGOMERY TO
MOTION TO TRANSFER CONSIDERATION OF ATTORNEY'S FEES
AND EXPENSES OF APPELLEE EDDIE J. HAYNES**

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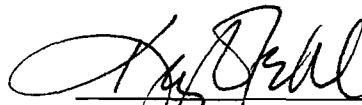
Attorney for Appellant
City of Montgomery, Alabama

CASE NO. 08-16533-DD
EDDIE J. HAYNES V. CITY OF MONTGOMERY

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Appellant City of Montgomery ("City") in response to the Motion to Transfer Consideration of Attorney's Fees and Expenses of Appellee Eddie J. Haynes ("Haynes"), pursuant to 11th Cir. R. 39-2(d), Federal Rules of Appellate Procedure, submits that the Motion should be denied as moot. Haynes also filed an Application for Attorney's Fees and Expenses of Appellee Eddie J. Haynes on October 9, 2009 which is properly before this Court.

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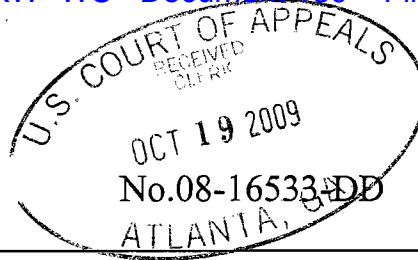
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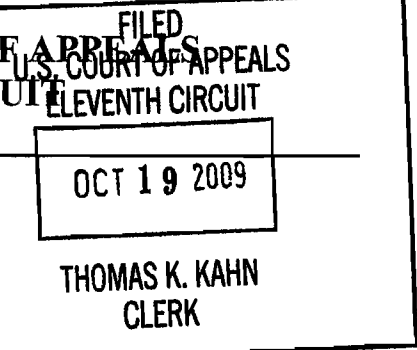
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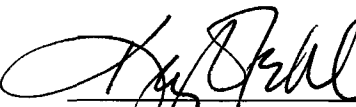
Attorney for Appellant
City of Montgomery, Alabama

CASE No. 08-16533-DD
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United States Court of Appeals

For the Eleventh Circuit

No. 08-16533

District Court Docket No.
06-01093-CV-W-N

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

Aug 27, 2009

THOMAS K. KAHN
CLERK

EDDIE J. HAYNES,

Plaintiff-Appellee,

versus

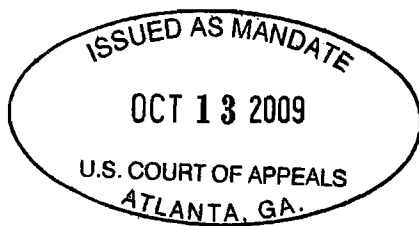
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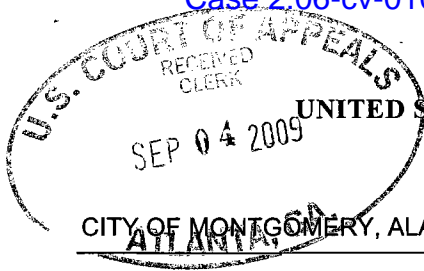
Appeal from the United States District Court
for the Middle District of Alabama

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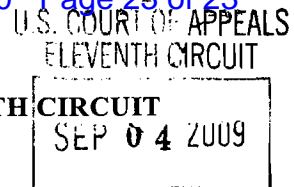
It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.



Entered: August 27, 2009
For the Court: Thomas K. Kahn, Clerk
By: Patch, Jeffrey



**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
BILL OF COSTS**



THOMAS K. KAHN
CLERK

CITY OF MONTGOMERY, ALABAMA

Appellant

vs.

Appeal No. 08-16533-DD

EDDIE J. HAYNES

Appellee

Fed.R.App.P. 39 and 11th Cir. R. 39-1 (see reverse) govern costs which are taxable in this court and the time for filing the Bill of Costs. A motion for leave to file out of time is required for a Bill of Costs not timely received.

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Record Excerpts	X		384	8 (7)	3072	460.80	\$403.20
Appellee's Brief	X		59	9	531	79.65	\$ 79.65
Reply Brief							
*Note: If reproduction was done commercially, receipt(s) must be attached.					TOTAL	\$ 540.45	\$ \$482.85
						REQUESTED	ALLOWED

I hereby swear or affirm that the costs claimed were actually and necessarily incurred or performed in this appeal and that I have served this Bill of Costs on counsel/parties of record.

Date Signed: 9/1/09

Signature: Gerald L. Miller

Attorney for: Eddie J. Haynes

Attorney Name: Gerald L. Miller

(Type or print name of client)

(Type or print your name)

FOR COURT USE ONLY

Costs are hereby taxed in the amount of \$ 482.85 against Appellant

and are payable directly to Appellee

OCT 13 2009

Issued on: _____

Thomas K. Kahn, Clerk

By: Trena A. Parker
Deputy Clerk